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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES FOSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can the Seventh Circuit give retroactive effect to an amendment of 26 U.S.C. § 7205 which specifically states that it is only effective for acts occurring subsequent to July 18, 1984, and as a result increase the criminal sanctions for acts occurring prior to the amendment's effective date?

2. Can an accused be convicted of violating 26 U.S.C. §§ 7201, 7203 and 7205 in the absence of substantial evidence of any affirmative acts in furtherance of the § 7201 charge and in the absence of substantial evidence that the accused voluntarily and intentionally violated a known legal duty with respect to any of the charges?

3. Can the Seventh Circuit negate the *mens rea* requirements of 26 U.S.C. §§ 7201, 7203 and 7205 by requiring that any good faith defense must be objectively reasonable?

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The petitioner, JAMES FOSTER (Foster), requests that a writ of certiorari issue to review the opinion of the Seventh Circuit Court of Appeals, which affirmed his conviction on seven income tax offenses: attempted evasion in 1981 and 1982 (26 U.S.C. § 7201); failure to file returns for 1979 through 1982 (26 U.S.C. § 7203); filing a false employee's withholding allowance certificate on February 22, 1982 (26 U.S.C. § 7205).

This prosecution was one of the first attempts by the DEPARTMENT OF JUSTICE (DOJ) and the INTERNAL REVENUE SERVICE (IRS) to convert misdemeanor violations of the revenue laws into felonies. It raises a crucial separation of powers question as well as the issue of whether the judicial branch is to function as a check on the excesses of the executive branch.

OPINION BELOW

The opinion of the Seventh Circuit affirming Foster's conviction and its order of May 13, 1986, amending that opinion are published at 789 F.2d 457 (See Appendices A and B). The order of May 23, 1986, was not published (See Appendix C).

JURISDICTION

The judgment of the Seventh Circuit was entered on April 10, 1986 (A. 13). The court denied Foster's petition for rehearing with suggestion for rehearing *en banc* on May 23, 1986 (C. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

Article 1, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Amendment 1

Congress shall make no law . . . abridging the freedom of speech. . . .

Amendment 5

No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law. . . .

TITLE 26, UNITED STATES CODE

Section 7201 (1982)

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 ($100,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7203 (1982)

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

Section 7205 (1982)

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu

of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

Public Law 98-369, § 159(a)(1)(2)

Section 159(a)(1) amended Code Section 7205 by striking out "in lieu of" each place it appeared and inserting in lieu thereof "in addition to".

Section 159(a)(2) amended Code Section 7205 by striking out "(except the penalty provided by section 6682)" each place it appeared.

The above amendments apply to actions and failures to act occurring after July 18th, 1984.

STATEMENT OF THE CASE

Foster acted PRO PER throughout the pre-trial proceedings and the trial itself. Believing that the court had no jurisdiction over him, Foster attempted to remain mute during the trial (T. 6, 7, 19, 47, 60, 89, 149, 156).*

Following a one day bench trial on March 25, 1985, in the United States District Court for the Northern District of Illinois, Eastern Division, Foster was found guilty on each of the seven counts of the indictment (D. 1). He was convicted on four counts of willfully failing to file an income tax return for 1979, 1980, 1981 and 1982 in violation of 26 U.S.C. § 7203; two counts of willfully attempt-

* T. refers to the trial transcript. R. refers to the record on appeal. ST. refers to the transcript of the sentencing hearing.

ing to evade income taxes in 1981 and 1982 in violation of 26 U.S.C. § 7201; and one count of wilfully filing a false employee's withholding allowance certificate on February 22, 1982, in violation of 26 U.S.C. § 7205 (T. 156).

At the time of trial, Foster was retired from the police department of the Village of Oak Brook, where he had served as a police officer for a number of years. On November 22, 1975, he suffered a heart attack which resulted in Foster being placed on disability status in 1976 (T. 98; R. 26).

Beginning in 1979, Foster went to work as a warehouse man for the WILL-DUPAGE SERVICE COMPANY, a farm cooperative. Foster retired from there in 1984 (T. 61-63). Foster, in addition, worked part time at the Article Two Corporation, a retail store which sold firearms (T. 105-06).

1. Prior to July 18, 1984, Congress had provided that the criminal sanctions set forth in 26 U.S.C. § 7205 were *in lieu of* any other penalty (except the penalty provided by section 6682) provided by law. In *United States v. Williams*, 644 F.2d 696 (C.A. 5, 1981), the Fifth Circuit held that the phrase "in lieu of" meant that:

> Congress has therefore confined the punishment for conduct in violation of section 7205 exclusively to that authorized under section 7205.

Id., at 644 F.2d 700. The *Williams* court reversed a conviction under section 7212 on the basis of its analysis.

As a result, Congress amended section 7205 by replacing the phrase "in lieu of" with the phrase "in addition to". Pub. Law 98-369, section 159(a)(1), 95 Stat. 341 (1984). The amendment was effective for violations occurring after July 18, 1984.

The employee allowance withholding certificates at issue in this case were submitted prior to that date. The last form at issue was submitted on February 22, 1982 (T. 82). The court below held that the "in lieu of" language of section 7205 referred only to the other tax misdemeanors and not to the felonies (A. 7). As a result, it concluded that Foster could be punished under section 7201 for a violation of section 7205.

2. Foster presented no defense at trial (A. 2). The evidence presented by the prosecution indicated that the IRS Service Center in Kansas City had no record that Foster had filed returns for 1979 through 1983 (T. 25-28). Those records also indicated that Foster's wife Shirley had filed returns for 1979 and 1980 and had listed Foster on those returns (T. 43-44). For 1976 through 1978, Foster and his wife filed joint returns (T. 27-37).

When Foster went to work at the Will-DuPage Service in April, 1979, he submitted a Form W-4 on which he claimed two allowances (T. 73). In January, 1981, Foster submitted another Form W-4 on which he claimed to be exempt from withholding (T. 74).

The IRS notified Will-DuPage by letter dated September 9, 1981, to ignore Foster's exempt W-4 and to begin withholding from him (T. 75). The letter, government exhibit 9, was sent out by the IRS Service Center in the ordinary course of its business (T. 42). In fact, in such cases where the IRS determines that the claimed exempt status is not allowable, the Service Center sends a letter to the employer telling it to withhold *whatever* the IRS wants withheld from that individual's account (T. 43).

From September, 1981, Will-DuPage was acting pursuant to IRS instructions with respect to Foster's withholding (T. 75-80). Foster wrote to his employer in Sep-

tember, 1981, after they began withholding again (T. 77). Foster tried to get them to stop withholding, but they refused to honor his request. The IRS had directed Will-DuPage to withhold on the basis of one allowance (T. 43) and that is what they did (T. 79). Foster's September 22, 1981 letter had no effect whatsoever.

The IRS had also instructed Will-DuPage that they had to honor Foster's exempt W-4 if he submitted another one during 1982 (T. 80). Foster filed another exempt W-4 on February 22, 1982; Will-DuPage honored it based upon the instructions of the IRS and based upon the recommendation of its own legal department (T. 80).

The prosecution strenuously argued during closing arguments that Foster did not have an objectively reasonable misunderstanding of the law (T. 151, 156). The only evidence adduced as to Foster's understanding of the law was contained in government exhibit 18, documents allegedly submitted by Foster to the IRS (T. 52-59).

The only other evidence of Foster's state of mind was the letter Foster had directed to his employer stating his belief that he was exempt from withholding (T. 77).

The court concluded without a moment's hesitation to weigh or consider the evidence that Foster had the requisite state of mind to be guilty of all of the offenses charged in the indictment (T. 156-157). The court did concede that it was not a mind reader, but that admission was made in the context of the pre-sentence investigation rather than with regard to the state of mind evidence (T. 158).

At the sentencing hearing, the district court stated that:

> This was, in my view, a classic case of evasion by non-filing. It is the simplest and most direct way there is to evade taxes: Just don't file any returns

> and hope that you will be able to escape punishment by advancing some argument that supposedly demonstrates your good faith in failing to file.

(ST. 17). The district court was oblivious to the fact that the law does not recognize a crime of "evasion by nonfiling." The court of appeals concluded that the district court's findings were not clearly erroneous (A. 9).

3. Each of the sections of the Internal Revenue Code at issue require that the accused act (or fail to act) wilfully. Following this Court's opinions in *United States v. Murdock*, 290 U.S. 389 (1933) and *United States v. Pomponio*, 429 U.S. 10 (1976), the majority of the circuits have held that the wilful requirement requires an inquiry into the accused's *actual* state of mind.

The Seventh Circuit, however, has specifically rejected the subjective test. It stated that:

> Whatever may be the theoretical objections, the Seventh Circuit has adopted an objective test: because the mistake of law defense is extremely limited, a mistake on the Defendant's part must be "objectively reasonable." (citations omitted)

(A. 8). In the Seventh Circuit an accused can be found guilty of violating sections 7201 through 7207 even if they have not acted with requisite wilful intent.

REASONS FOR GRANTING THE WRIT

1. In holding that an accused could be punished for violating section 7205 under both that section and under section 7201 for acts occurring prior to July 18, 1984, the court below was violating the intent of Congress, the express language of section 7205, and the rule of lenity expressed by this Court in *Liparota v. United States*, ____ U.S. ____, 105 S.Ct. 2084 (1985), in *Ladner v. United States*, 358 U.S. 169 (1958) and *Simpson v. United States*, 435 U.S. 6 (1977). The opinion was also in direct conflict with *United States v. Williams*, 644 F.2d 696, 700 (C.A. 5, 1981).

The Constitution vests all legislative powers in Congress. Article 1, section 1. The court below usurped the legislative function by substituting its interpretation of section 7205 for the express mandate of Congress. It did so in order to give its stamp of approval to the new IRS/DOJ policy of converting misdemeanor tax violations into felony violations.

Congress explicitly stated in 26 U.S.C. § 7205 that the sanctions imposed by that section:

> . . . are in lieu of any other penalty provided by law (except the penalty provided by section 6682). . . .

The opinion below found some ambiguity in that language and found that "in lieu of" did not mean that the government could not use a violation of 7205 as a basis for a section 7201 prosecution (A. 7-8). It concluded that the phrase "in lieu of" referred only to other misdemeanors and not to evasion (A. 7). There is, however, no basis for such distinction, because there is no ambiguity in the language of the statute.

This Court has made it clear that courts are barred from interpreting a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based upon no more than a guess as to what Congress intended. *Liparota v. United States*, at 105 S.Ct. 2089; *Ladner v. United States*, at 358 U.S. 178. The opinion below ignored the express language of the statute in order to engage in the pointless exercise of trying to guess what Congress intended; the exercise was pointless because there was no ambiguity in the language used by Congress.

Congress itself spoke to this issue in Public Law 98-369, by replacing the phrase "in lieu of" with the phrase "in addition to." The amendment was effective for violations occurring after July 18, 1984, and therefore is inapplicable to this case. The alleged violations here all occurred prior to 1983.

The Seventh Circuit recognized that this amendment was in response to the *Williams* decision in the Fifth Circuit, *United States v. Williams*, 644 F.2d 696, 700 (C.A. 5, 1981). The *Williams* court reversed a section 7212 conviction on the basis of the "in lieu of" language in section 7205.

Clearly Congress intended that criminal prosecutions for filing false withholding allowance certificates were to be maintained solely under section 7205 for acts occurring prior to July 18, 1984. The opinion below gives retroactive effect to that amendment by condoning the use of a section 7205 violation to make out a case for a section 7201 prosecution prior to the effective date of the amendment.

In so doing, the court below was acting as if it were the Congress; as if it could re-write the law to conform

to the desires of the IRS/DOJ. The rising tide of discontent with our tax system will not be resolved by the courts acting in such a lawless fashion.

The court below condoned a felony evasion prosecution where the only affirmative acts in furtherance of the attempted evasion were the submission of allegedly false Forms W-4 and the submission of a letter by Foster to his employer (D. 3, 5).

What happened to the intent of Congress? What happened to the First Amendment? The judicial branch is supposed to function as a check on the executive branch, not as a rubber stamp for its lawless activities. This Court must now intervene, to restore balance to our Constitutional system and to restore the rule of lenity as set forth in *Ladner v. United States*, 358 U.S. 169, 178 and *Simpson v. United States*, 435 U.S. 6, 14-15 and in *Liparota, supra* at 105 S.Ct. 2089.

2. Intervention by this Court is further required by the lower court's rejection of the presumption of innocence and its misapplication of this Court's decisions in *Spies v. United States*, 317 U.S. 492 (1943), in *United States v. Pomponio*, 429 U.S. 10 (1976) and in *Jackson v. Virginia*, 433 U.S. 307 (1979).

In the trial court's view, this was a simple case of evasion by non-filing (ST. 17). However, this Court recognized forty-three years ago that an attempted evasion charge requires an affirmative act in furtherance of the attempt; non-filing of an income tax return is insufficient to sustain an attempted evasion charge. *Spies v. United States*, 317 U.S. 492, 497 (1943). Justice Jackson wrote in this regard that:

> A felony may, and frequently does, include lesser offenses in combination either with each other or with

> other elements. We think it clear that this felony may include one or several of the offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145(b) meant no more that the same derelictions it had just defined in § 145(a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

Id., at 497. It is apparent from Justice Jackson's analysis, that Foster's omission in filing tax returns for 1981 and 1982 is simply no basis for finding him guilty of income tax evasion in 1981 and 1982.

Justice Jackson's analysis must also be applied to the § 7205 charge. Count 7 alleged that Foster wilfully submitted a false and fraudulent Form W-4 when he well knew that he was not entitled to claim total exemption from withholding tax (D. 7).

Congress has specifically defined the filing of a false Form W-4 as a misdemeanor in § 7205. As Justice Jackson stated, it would be unusual and one cannot assume that Congress by the felony which is now defined in § 7201, meant no more than the same dereliction it had already defined as a misdemeanor in § 7205.

Congress has established a system of sanctions which, as noted in *Spies*:

> singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

Id., at 497. By congressional mandate, filing a false Form W-4 has been determined to be a delinquency rising to the level of a misdemeanor, not a felony. Therefore, the submission of a false W-4 cannot give rise to a felony violation of § 7201.

Here, the evidence showed that Foster's W-4's were not operational. His employer Will-DuPage, was notified by the IRS in a letter dated September 9, 1981, to disregard Foster's exempt W-4 and to withhold on the basis of single with one allowance (T. 75). Will-DuPage was acting pursuant to IRS instructions from that point on (T. 75-80).

As Justice Jackson observed, the proof in an evasion case must give rise to an inference of wilful attempt to evade or defeat the tax from:

> some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference, the Defendant should be acquitted.

317 U.S. at 500. The evidence adduced below, did not live up to the *Spies* test.

In order to obtain a conviction under § 7201, the prosecution was required to prove wilfulness, a substantial tax deficiency, and an affirmative act constituting an attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Spies, supra.* The prosecution simply failed to meet that burden. There was no proof of wilfulness, there was no proof of an affirmative act constituting an attempted evasion and the proof did not even exclude the possibility that Foster had sufficient credits, allowances and/or deductions to offset any liability.

The submission of exempt W-4s by Foster in 1981 and in 1982 were not sufficient to satisfy the affirmative act

requirement. The affirmative conduct must have the likely effect of misleading or concealing. *Spies, id.*, 317 U.S. at 499. There was no concealment of income as a result of the exempt W-4s; as stated, the IRS notified Will-DuPage to disregard the 1984 exempt W-4 and withhold on the basis of one allowance (T. 43, 75, 79). Furthermore, Will-DuPage was required to submit Foster's W-2 wage statements to the IRS each year, so there could not have been any concealment of his salary from the IRS.

Neither Will-DuPage nor the IRS were misled by the W-4s. Foster's employer followed the orders of the IRS, not Foster's forms. Will-DuPage would have continued to withhold on the basis of one allowance in 1982 despite Foster's 1982 exempt W-4, *but for* the instructions of the IRS—do not withhold if Foster submits another exempt W-4 in 1982 (T. 80).

Will-DuPage was also acting upon the advice of their own legal department (T. 80). Pursuant to 26 U.S.C. § 3402(n), Will-DuPage was not required to withhold so long as there was an exempt Form W-4 on file. A new certificate is required at the beginning of each year.

Since Will-DuPage was acting pursuant to the instructions of the IRS and its own legal department, it is difficult to imagine how the IRS was misled by Foster's actions.

Incredibly, the court below also permitted the prosecution to get away with using Foster's September 28th, 1981, letter to his employer as an affirmative act in furtherance of the attempted evasion charges for 1981 and 1982. Foster wrote that letter to his employer after the IRS had notified the employer to disregard Foster's exempt W-4 and withhold on the basis of one allowance (T. 43, 77). The letter did not go to the IRS and did not mislead the IRS.

The evidence was clear that Foster's employer was abiding by the instructions of the IRS from September, 1981. The IRS wrote to Will-DuPage on September 9th, 1981, and instructed them to disregard Foster's exempt W-4.

Will-DuPage ignored Foster's W-4 and withheld on the basis of one allowance. They were not misled by Foster's September 28th, 1981, letter; they ignored it. Foster could just as well have said that the moon was made out of green cheese in that letter for the effect it had on his employer.

Yet the court allowed the prosecution to use it to substantiate both the 1981 and the 1982 evasion charges. The letter did not conceal unreported income. It did not mislead the IRS or Will-DuPage. It is, in fact, a First Amendment communication between Foster and his employer.

While *Spies* did not delineate all actions which could constitute wilful attempt, Justice Jackson did shed some light on the proposition:

> By way of illustration, and not by way of limitation, we would think affirmative wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

317 U.S. at 499. Foster's conduct is so remote from that type of conduct that it is inconceivable to conclude that an ignored letter can give rise to an evasion charge.

Both the trial court and the court of appeals ignored the presumption of innocence and the effect that presump-

tion was to have had on their review of the evidence. The presumption does not disappear even when viewing the evidence in a light most favorable to the prosecution.

Due process and this Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) require that there be *substantial* evidence in the record to support the verdicts. Substantial evidence entails something more than unfounded inferences and conjecture, which is the basis of the convictions below.

When Foster's presumption of innocence is coupled with the lack of any direct evidence and the dubious nature of the circumstantial evidence, the failure of proof becomes self-evident. There was no proof beyond a reasonable doubt that Foster voluntarily and intentionally violated a known legal duty with respect to any of the charges for the relevant time periods as is required to sustain these convictions. *United States v. Pomponio*, 429 U.S. 10, 12 (1976). His conviction violates the due process clause of the Fifth Amendment.

The requirement to prove the specific intent of wilfulness required the prosecution to establish beyond a reasonable doubt Foster's subjective state of mind on April 15th, 1980, April 15th, 1981, April 15th, 1982, April 15th, 1983 and February 22, 1982 (D. 1-6). *United States v. Aitken*, 755 F.2d 188, 1982 (C.A. 1, 1985). The prosecution did not prove Foster's state of mind for those periods and therefore did not prove its case. *United States v. Burton*, 737 F.2d 439, 441 (C.A. 5, 1984).

In finding Foster guilty on all counts, the trial court assumed the requisite mental state from the Defendant's actions. In so doing, the court assumed that Foster was guilty and ignored both his presumption of innocence and the prosecution's burden of proof.

The prosecution did introduce previous returns filed by Foster. The court assumed from those returns, the requisite mental state despite the fact that those returns did not amount to substantial proof establishing beyond a reasonable doubt, Foster's mental state for the relevant time periods. The court of appeals condoned that lack of proof and denigration of the presumption of innocence in violation of the Fifth Amendment.

The prosecution failed to prove that Foster knew his acts or omission were illegal at the time the alleged conduct took place. Congress has required, and this Court has recognized that the crimes at issue in this case require proof of wilfulness. This in turn requires proof that Foster knew his acts were illegal. *Liparota v. United States, supra,* at 105 S.Ct. 2091. The opinion below has the precise effect which this Court warned against in *Liparota*—it criminalizes innocent conduct by convicting a Defendant for acts which he did not believe were illegal.

There was no evidence that Foster believed it was against the law for him to submit exempt Forms W-4; in fact the law specifically provides for such forms. 26 U.S.C. § 3402(n). There was no evidence that Foster knew he was required to file returns for 1979 through 1982. There was no evidence from which the lower courts could infer that Foster acted without a basis for believing that his actions were lawful.

This Court must grant the writ to restore the presumption of innocence and due process to the Seventh Circuit.

3. In rejecting the subjective test for determining wilfullness, the Seventh Circuit opinion is in direct conflict with *United States v. Murdock,* 290 U.S. 389 (1933); *United States v. Bishop,* 412 U.S. 346 (1973); *United States v. Pomponio,* 429 U.S. 10 (1976); *United States v. Bur-*

ton, 737 F.2d 439 (C.A. 5, 1984); *United States v. Aitken*, 755 F.2d 188 (C.A. 1, 1985); *United States v. Phillips*, 775 F.2d 262 (C.A. 10, 1985).

This Court, in *United States v. Murdock*, described the specific intent of willfullness as follows:

> He whose conduct is defined as criminal is one who "willfully" fails . . . to make a return. Congress did not intend that a person by reason of a bonafide misunderstanding as to his . . . duty to make a return . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct.

290 U.S. at 396. In *United States v. Bishop*, this Court held that the element of willfullness is the same in all federal tax offenses, whether felonies or misdemeanors. In so holding, the Court observed that:

> the word "willfully" in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty.

412 U.S. at 360.

The court emphasized this point in *United States v. Pomponio*, where it stated that:

> . . . willfulness in this context simply means a voluntary, intentional violation of a known legal duty.

429 U.S. at 12. Following these decisions, six courts of appeals either explicitly or implicitly required proof of subjective intent to disobey the requirements of the tax statute at issue in order to establish that the Defendant acted with the requisite intent: First Circuit—*United States v. Aitken, supra*; Second Circuit—*United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97, *cert. denied*, ____ U.S. ____, 103 S.Ct. 3111 (1983); Fourth Circuit—*Yarborough v. United States*, 230 F.2d 56, 61, *cert. denied*, 351 U.S. 969 (1956); Fifth Circuit—*United States v. Burton, supra*;

Mann v. United States, 319 F.2d 404, 409-10 (1963), *cert. denied*, 375 U.S. 986 (1964) (court found an instruction that invited the jury "to speculate as to what any other person . . . would reasonably have expected to be the consequence of [his] conduct" to be plain error); Sixth Circuit—*Battjes v. United States*, 179 F.2d 1, 4 (1949) (a bona fide misconception of the law is a defense to failure to file regardless of the general presumption that one knows the law); Tenth Circuit—*United States v. Phillips*, *supra*; *Hagler v. United States*, 172 F.2d 986, 989 (1949); *United States v. Ware*, 608 F.2d 400, 405 (1975). In these circuits, the prosecution must prove the subjective intent of the accused, i.e., that the proscribed act or omission was committed voluntarily and intentionally, with knowledge of its illegality.

The opinion below has the effect of nullifying the wilful requirement by requiring that any good faith misunderstanding of the law must be objectively reasonable before it can be a defense (A. 8). In the First and Fifth Circuits, it is *plain error* to limit the good faith defense in such a manner. See *Mann v. United States*, *supra* at 319 F.2d 409-10 and *United States v. Aitken*, *supra* at 755 F.2d 194.

The Seventh Circuit's rejection of the subjective test means that in criminal tax trials in that circuit, the trier of fact must judge whether or not the accused acted as a reasonably prudent man, instead of judging the *mens rea* of the accused. As this Court recently observed in another reversal of the Seventh Circuit, criminal offenses requiring no *mens rea* have a generally disfavored status. The failure of Congress to indicate whether *mens rea* is required does not signal a departure from this *grundnorm* of our criminal law. *Liparota*, *supra* at 105 S.Ct. 2088.

Congress explicitly indicated that an accused must act wilfully to be guilty of violating the statutes at issue in this prosecution. 26 U.S.C. §§ 7201, 7203, 7205. The Tenth Circuit observed that the Seventh Circuit stands alone in its approval of an objectively reasonable standard in these types of cases. *United States v. Phillips, supra,* at 755 F.2d 264.

The Seventh Circuit's stubborn rejection of the subjective standard and its reference to this issue as a "theoretical objection (A. 8)", mandate intervention by this Court. The Seventh Circuit's rejection of the subjective test means that those accused of violating the tax statutes in that circuit are denied due process by the elimination of the *mens rea* requirements mandated by Congress, by this Court and by nearly every other circuit in the country.

Due process and equal protection considerations dictate that the writ be granted and that this Court reverse the opinion below.

CONCLUSION

For these reasons, the petition for a writ of certiorari must be granted.

Respectfully submitted,

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Attorney for Petitioner
James Foster

Dated: July 22, 1986

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1925

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES FOSTER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 CR 41—**John F. Grady**, *Judge.*

ARGUED DECEMBER 13, 1985—DECIDED APRIL 10, 1986

Before CUMMINGS, *Chief Judge*, CUDAHY, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* Defendant James Foster appeals his conviction on four counts of willfully failing to file an income tax return, in violation of 26 U.S.C. § 7203; two counts of willfully attempting to evade income taxes, in violation of 26 U.S.C. § 7201; and one count of willfully filing a false employee's withholding allowance certificate, in violation of 26 U.S.C. § 7205. We affirm.

Before 1979 James Foster filed yearly income tax returns, although in 1977 and 1978 he did not pay the full amount of tax due. For the years 1979, 1980, 1981 and 1982, he filed no tax returns, although he was

employed at that time at Will-DuPage Service Co., in Wheaton, Illinois and was collecting disability pension benefits from the Village of Oak Brook, Illinois, where he had previously been employed as a policeman.

When he went to work for Will-DuPage Foster filed an employee's withholding allowance certificate ("W-4 form"), properly claiming two allowances. (He was married at that time.) On January 1, 1981, he filed a new—and false—W-4 form with Will-DuPage, claiming an exemption from withholding on the grounds that he did not owe any federal tax in 1980 and did not expect to owe any in 1981. In September 1981 the Internal Revenue Service (the "IRS") notified Will-DuPage that Foster's 1981 W-4 form was incorrect and instructed it to start withholding tax on the basis of one allowance. (Foster was divorced from his wife that month.) Will-DuPage withheld as directed. Foster wrote to his employer with instructions to stop withholding. He wrote his employer another letter in February 1982, denying that he had any tax liability and again demanding that the withholding stop. Two days later he filed another false W-4 form, claiming exemption from withholding on the basis that he owed no federal tax for 1981. On instructions from the IRS, Will-DuPage stopped withholding.

In January 1985 a grand jury indicted Foster for willfully failing to file income tax returns in 1979, 1980, 1981 and 1982; willfully attempting to evade income taxes in 1981 and 1982; and willfully filing a false W-4 form in 1982. Foster, appearing pro se, waived trial by a jury and presented no defense at his trial before the district judge. He was found guilty on all counts, the judge finding that he had known that he was required to file income tax returns and failed to do so; that he had filed false W-4 forms knowing them to be false; and that his overall purpose had been to evade taxes. Transcript of Proceedings (March 25, 1985), at 156-57.

At the sentencing hearing, Foster was represented by counsel. He was sentenced to eighteen months' imprisonment: six months on Count One (failure to file in 1979);

twelve months on Count Two (failure to file in 1980), to run consecutively to Count One; eighteen months on Count Three (attempted tax evasion in 1981), to run concurrently with Counts One and Two; twelve months on Count Four (failure to file for 1981), to run consecutively to Count One but concurrently with Counts Two and Three. Sentence was suspended on Counts Five through Seven (attempted tax evasion for 1982, failure to file in 1982, filing a false W-4 form in 1982).

Foster raises three arguments on appeal: (1) that conviction for both the misdemeanors of failure to file and of filing a false W-4 form and the felony of attempted tax evasion for the years 1981 and 1982 violated the double jeopardy clause of the Fifth Amendment; (2) that the evidence was insufficient to establish the mental state necessary for a conviction on any count; and (3) that the prosecution was void *ab initio* because the Sixteenth Amendment to the federal Constitution was never properly ratified.

Foster argues that his convictions for both the § 7201 felony and the § 7303 and § 7305 misdemeanors violated the double jeopardy clause. A violation of 26 U.S.C. § 7201[1] requires proof of the following elements: (1) the existence of a tax deficiency; (2) an affirmative act constituting an evasion or attempted evasion of the tax; and (3) willfullness. *Sansone v. United States*, 380 U.S. 343, 351 (1965). In support of its assertion that Foster attempted to evade taxes in 1981, the government offered evidence that he (1) failed to file an income tax return for that year; (2) filed a false W-4 form with his employer

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[1] 26 U.S.C. § 7201 (1982) provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

for that year; and (3) directed correspondence to his employer in late 1981 instructing him to honor his W-4 form and stop withholding. For the 1982 violation of § 7201, the government offered evidence that Foster (1) failed to file a tax return in 1982; (2) directed correspondence to his employer in early 1982 instructing him to stop withholding; (3) filed a false W-4 form with his employer in 1982. Because he was convicted of the misdemeanors of failure to file and filing false W-4 forms as well as the tax evasion felonies for 1981 and 1982, Foster contends that his Fifth Amendment protection against "cumulative punishments for the same offense" has been violated.

In its recent opinion in *Garrett v. United States*, 105 S. Ct. 2407 (1985), the Supreme Court discussed the double jeopardy analysis to be undertaken when the same conduct violates two statutory provisions. The first step is to determine whether Congress intended that each violation be a separate offense. "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction.*" *Id.* at 2412 (emphasis in original), *quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932). The inquiry is into the language, structure and legislative history of the statutes involved. *Garrett*, 105 S. Ct. at 2412. If the legislative intent is unclear, it can also be inferred by using the test laid out in *Blockburger v. United States*—whether "[e]ach of the offenses created requires proof of a different element." *See Garrett*, 105 S. Ct. at 2411, *quoting Blockburger*, 284 U.S. at 304.

As for the § 7203[2] misdemeanors, the statutory language suggests two separate offenses: both § 7201 and

[2] 26 U.S.C. § 7203 (1982) reads in relevant part:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made

(Footnote continued on following page)

§ 7203 state that the penalties imposed are "in addition to other penalties provided by law." *See supra* notes 1 & 2. The legislative history, on the other hand, is inconclusive. See S. Rep. No. 1622, 83d Cong., 1st Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4621, 5251 ("Under these amendments, section 7201 will apply only to a willful attempt in any manner to evade or defeat the tax or payment thereof, and the lesser offense of a willful failure to file a tax return will be punishable as a misdemeanor under section 7203."); H. Conf. Rep. No. 2543, 83d Cong., 1st Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 5280, 5343-44 (substantially similar language).

The structure of the statute—one broad felony followed by a large number of related misdemeanors—suggests different offenses. The Supreme Court in *Spies* described § 7201 as "the capstone of a system of sanctions which *singly or in combination* were calculated to induce prompt and forthright fulfillment of every duty under the income tax law . . . ." *Spies*, 317 U.S. at 497 (emphasis supplied). The court in *Reynolds v. United States*, 288 F.2d 78 (5th Cir.), *cert. denied*, 368 U.S. 883 (1961), agreed, holding that Congress intended a § 7201 offense and the misdemeanor of willfully failing to pay tax, 26 U.S.C. § 7202, to be separate offenses. Further, applying the *Blockburger* test, we find that a violation of either statute would not necessarily entail a violation of the other. *See United States v. Woodward*, 105 S. Ct. 611, 612 (1985). In *Woodward*, the defendant made a false statement to a customs

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[2] *continued*

under authority thereof to make a return . . . keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 . . . or imprisoned not more than 1 year, or both, together with the costs of prosecution . . . .

agent when declaring what he was bringing into the country. He was convicted of making a false statement to a United States agency and willfully failing to report that he was carrying more than $5,000 into the country. Although the same conduct—answering "no" to the question whether he was bringing more than $5,000 into the country—was the basis for both convictions, the Court noted that "proof of a currency reporting violation does not *necessarily* include proof of a false statement offense." *Id.* (emphasis supplied).

A § 7203 misdemeanor requires proof that (1) the defendant had a legal duty to file a tax return; (2) he failed to do so; and (3) he acted willfully. *United States v. Gorman*, 393 F.2d 209, 213 (7th Cir.), *cert. denied*, 393 U.S. 832 (1968). There is no requirement of an affirmative act, whereas a § 7201 offense requires some affirmative act. Failure to file without more will not sustain a conviction under § 7201. *United States v. Spies*, 317 U.S. 492, 499 (1943). Conversely, while someone attempting to evade or defeat tax will often fail to file a return, this is not necessary for the completion of the offense (for instance, one could file a fraudulent return or file a return without remitting payment). Finally there is no indication that Congress did not intend these two statutory provisions to be separate offenses. *See Albernaz v. United States*, 450 U.S. 333, 340 (1981). All guides to legislative intent suggest that Congress meant §§ 7201 and 7203 to constitute separate offenses and that Foster's convictions for both offenses do not violate the double jeopardy clause.

With regard to the § 7205[3] violation, Congress stated its intent in the statutory language: a criminal conviction

[3] 26 U.S.C. § 7205(a) (1982) reads:

> Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information thereunder which would require an increase in the tax to be withheld under section 3402, shall in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

for a violation of § 7205 should be "in lieu of any other penalty provided by law."[4] This language was added by § 1626(d) of The Current Tax Payment Act of 1943, Pub. L. No. 68, 57 Stat. 126, 138, *codified at* 26 U.S.C. § 470(d) (I.R.C. 1939), and the legislative history explains that the penalties imposed by the section "are in lieu of those provided in section 145(a) of the code." S. Rep. No. 221, 78th Cong., 1st Sess. 31 (1943). Section 145(a) of the 1939 Internal Revenue Code was a misdemeanor offense of failing to file returns, submit information or pay tax and was the apparent predecessor to § 7203 of the 1954 Code. Section 145(b) was, however, a felony offense producing a heavier penalty for "any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter . . . ." Thus, it appears that Congress intended a conviction for filing a false W-4 form to be in lieu of other misdemeanors involving filing but not in lieu of the felony offense of attempting to evade the income tax. This further buttresses our view that Congress intended the § 7201 offense to be an offense separate from the numerous misdemeanors in the Code. When § 470(d) was moved to § 7205 in the current tax code, the legislative history noted that no change was intended from existing law. S. Rep. No. 1622, 83d Cong., 1st Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4621,

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[4] *See supra* note 3. For violations occurring after July 18, 1984, Congress has amended this provision to read that a § 7205 criminal penalty shall be "in addition to" any other penalty provided by law. Pub. L. No. 98-369, § 159(a)(1), 95 Stat. 341 (1984). The legislative history examined the change: "Thus for example, prosecution for willful evasion (sec. 7201) is not barred where prosecution for a false certificate (sec. 7205) is also possible." H. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1001 (1984), *reprinted in* [1984] U.S. Code Cong. & Admin. News 751, 995. The amendment was made in response to *United States v. Williams*, 644 F.2d 696, 700 (8th Cir.), *cert. denied sub nom. Terrell v. United States*, 454 U.S. 841 (1981), where the court ruled that Congress intended filing a false W-4 form to be punished solely under § 7205 and did not intend such conduct to be included under § 7212 (endeavoring to obstruct the due administration of the Internal Revenue Code).

5252. As with § 7203, filing a false W-4 form and attempting to evade taxes are separate offenses under *Blockburger* as well. Since Congress intended that § 7201 and § 7205 be separate offenses, Foster's double jeopardy argument must fail.[5]

Second, Foster argues that his convictions on all counts are not supported by sufficient evidence because the government did not prove that he had the requisite state of mind for any of the offenses. The government was required to prove that Foster acted "willfully" with respect to each of the seven offenses.

To show that Foster acted willfully, the government needed to demonstrate that Foster intentionally violated a known legal duty—it was not required to show any bad purpose on his part. *United States v. Pomponio*, 429 U.S. 10, 12 (1976). Foster's reliance upon *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985), and *United States v. Phillips*, 775 F.2d 262 (10th Cir. 1985), where a subjective test—requiring an inquiry into the defendant's *actual* state of mind—was employed, is misplaced. Whatever may be the theoretical objections, the Seventh Circuit has adopted an objective test: because the mistake of law defense is extremely limited, a mistake on the defendant's part must be "objectively reasonable." *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). *Accord United States v. Witvoet*, 767 F.2d 338, 340 (7th Cir. 1985); *United States v. Bressler*, 772

[5] We also note that, since all of these convictions were obtained at one trial, Foster's only argument can be against cumulative punishments, not cumulative prosecutions. In fact, the sentencing was arranged in such a way that he received only eighteen months' imprisonment overall. He was sentenced to eighteen months on Count Three (attempted tax evasion in 1981) and received a suspended sentence on Count Five (attempted tax evasion in 1982). The other sentences ran concurrently with Count Three and (with some running concurrently with each other) equaled eighteen months. Thus, even if there had been a double jeopardy violation we fail to see how, under the sentencing scheme here, it resulted in cumulative punishment.

F.2d 287, 290 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 852 (1986).

Moreover, the evidence supports the conclusion that Foster acted willfully under *either* test. The district court found that Foster knew that he had to file income tax returns, that he knew that he had made false statements on his W-4 Forms, and that he had an "overall purpose" to evade taxes he knew he owed. We cannot say that these findings were clearly erroneous. Before 1979 Foster filed taxes regularly and before 1980 he filed accurate W-4 forms with his employers. He also received several notifications about his tax liability from the IRS. Also in the record are tax protester materials Foster sent to the IRS and to Will-DuPage. The evidence supports the conclusion that Foster acted willfully in failing to file tax returns, filing a false W-4 form and attempting to evade taxes.

Foster's third assertion of error is that his prosecution under the Internal Revenue Code of 1954, 26 U.S.C. § 1 *et seq.*, was void *ab initio* because the Sixteenth Amendment to the federal Constitution was never properly ratified. Foster only gave this court the briefest of explanations, in his reply brief, as to *why* the amendment was improperly ratified. In his opening brief he incorporated by reference the brief filed by the defendant-appellant in *United States v. Ferguson*, No. 85-1688, currently pending before this court.

This incorporation method violates F.R.A.P. 28(a)(4), which requires that an appellant's brief contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Mr. Foster has merely cited to a brief in a unrelated case, prepared by a different attorney from his own—which itself does not explain why the Sixteenth Amendment is void beyond stating the conclusion that the required number of state legislatures never ratified the amendment and that then-Secretary of State Philander C. Knox

falsified the certification record. *See* Appellant's Brief, *United States v. Ferguson*, No. 85-1688, at 10.

In his reply brief, Foster sets forth the following contentions: (1) that on February 25, 1913 Secretary Knox certified the Sixteenth Amendment as duly ratified, 36 states having tendered ratifying resolutions to the State Department; (2) that Knox knew that 11 states had adopted versions with different wording, 22 states had altered the amendment's punctuation, and one state (Kentucky) had actually rejected the proposed amendment; (3) that the Office of the Solicitor had informed Knox that "a legislature is not authorized to alter in any way the amendment proposed by Congress"; (4) that Knox therefore knew he was under a duty to instruct those 33 states that they must ratify a conforming version of the amendment. Appellant's Reply Brief at 10-12. Based on these contentions, Foster asserts that the ratification of the Sixteenth Amendment did not comply with Article V of the Constitution and that therefore the Sixteenth Amendment is unconstitutional.

At the outset, we note that the Sixteenth Amendment has been in existence for 73 years and has been applied by the Supreme Court in countless cases. While this alone is not sufficient to bar judicial inquiry, it is very persuasive on the question of validity. In *Knoblauch v. Commissioner*, 749 F.2d 200 (5th Cir. 1984), *cert. denied*, 106 S. Ct. 95 (1986), the court was presented with the argument that the Sixteenth Amendment had not been properly ratified because "Ohio was not a state when it ratified the amendment, that William Howard Taft, being from Ohio, was thus not legally president at that time, and that all laws enacted during Taft's administration are therefore void." *Id.* at 201. The court found persuasive in rejecting that argument the fact that " 'recognition of the validity of [the] amendment [has] continued in an unbroken line.' " *Id.* at 202, *citing Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir. 1984). *See also, e.g., Maryland Petition Committee v. Johnson*, 265 F. Supp. 823, 826 (D. Md. 1967), *aff'd*, 391 F.2d 933 (4th Cir.), *cert. denied*, 393

U.S. 835 (1968) (Fourteenth Amendment's "age and usage" are "persuasive indicia" of valid ratification); *United States v. Association of Citizens Councils*, 187 F. Supp. 846, 848 (W.D. La. 1960) (noting in upholding validity of Fourteenth and Fifteenth Amendments the "hundreds of cases in which the United States Supreme Court has applied these Amendments").[6]

Thus, we would require, at this late hour, an exceptionally strong showing of unconstitutional ratification. Foster has not made such a showing. He has not asserted any authority, binding on this court or for that matter on Secretary Knox in 1913, for his contention that a state's ratifying resolution may not have different punctuation or slightly different wording than Congress' ver-

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[6] Further, we note that there is authority for treating the validity of an amendment's ratification as a non-justiciable political question. In *Leser v. Garnett*, 258 U.S. 130 (1922), it was objected that the resolutions of two states ratifying the Nineteenth Amendment did not conform to those states' legislative procedure. The Supreme Court ruled that

> [t]he proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six states, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the legislatures of Tennessee and of West Virginia had power to adopt resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, *and, being certified to by his proclamation, is conclusive upon the courts.*

Id. at 137 (emphasis supplied). In *Coleman v. Miller*, 307 U.S. 433, 450 (1939), the Court refused to address the effect of a previous ratification or rejection of the Child Labor Amendment upon a subsequent ratification, finding this "a political question pertaining to the political departments." These two cases have been followed by several lower courts, *see, e.g., United States v. Ferguson*, No. 84-100-CR (N.D. Ind. Jan. 15, 1985) (addressing same arguments as this appeal concerning invalidity of Sixteenth Amendment); *Maryland Petition Committee*, 265 F. Supp. at 825-27 (addressing contention that fewer than three-quarters of the states ratified Fourteenth Amendment).

sion of an amendment.[7] He offers no support for his claim that any wording changes were not inadvertent but rather the product of "deliberate malfeasance." He has not shown that these slight variations affected the meaning of what the states acceded to in ratifying the amendment. "[He] has merely pointed to technical variances which may be of some historical interest but which have no substantive effect on the meaning of the Sixteenth Amendment." *United States v. House*, 617 F. Supp. 237, 238-39 (W.D. Mich. 1985) (addressing precisely the same contentions on a complete record). He clearly has not carried the burden of showing that this 73-year-old amendment was unconstitutionally ratified.

For all of the foregoing reasons, the conviction of James Foster on all counts is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[7] Foster dispenses with the ultimate conclusion of the Solicitor—that the ratification was proper—by calling it a "house of cards." Appellant's Reply Brief at 12. One district court has found the reasoning in the Solicitor's memorandum "as persuasive to this Court as it apparently was to Secretary Knox." *United States v. House*, 617 F. Supp. 237, 239 (W.D. Mich. 1985).

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 10, 1986

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-1925 vs.

JAMES FOSTER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 CR 41—**John F. Grady**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 13, 1986

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-1925 vs.

JAMES FOSTER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 CR 41—**John F. Grady**, *Judge.*

ORDER

The opinion in the above-entitled cause, issued on April 10, 1986, is amended as follows:

Page 7 of slip opinion—line 3: omit "§ 1626(d)" and replace with "§ 2(a)".

Page 7 of slip opinion—line 4: omit "§ 470(d) and replace with "§ 1626(d)".

Page 7 of slip opinion, line 21: omit "§ 470(d) and replace with "§ 1626(d)".

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 23, 1986

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-1925 vs.

JAMES FOSTER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 CR 41—**John F. Grady**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

JAMES FOSTER,

No. 85 CR 041
Violation: Title 26, United States Code,
Sections 7203, 7201 and 7205.

The SPECIAL OCTOBER 1984 GRAND JURY charges that:

During the calendar year 1979 in the Northern District of Illinois, Eastern Division,

JAMES FOSTER,

defendant herein, who was a resident of Oswego, Illinois, had and received a gross income of approximately $25,561.00; that by reason of such income he was required by law, following the close of the calendar year 1979 and on or before April 15, 1980 to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago in the Northern District of Illinois, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and

knowingly fail to timely make said income tax return to the District Director of Internal Revenue, to the Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT TWO

The SPECIAL OCTOBER 1984 GRAND JURY further charges that:

During the calendar year 1980 in the Northern District of Illinois, Eastern Division,

JAMES FOSTER,

defendant herein, who was a resident of Oswego, Illinois, had and received a gross income of approximately $29,066.76; that by reason of such income he was required by law, following the close of the calendar year 1980 and on or before April 15, 1981 to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago in the Northern District of Illinois, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to timely make said income tax return to the District Director of Internal Revenue, to the Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT THREE

The SPECIAL OCTOBER 1984 GRAND JURY further charges that:

During the calendar year 1981 in the Northern District of Illinois, Eastern Division,

JAMES FOSTER,

defendant herein, who was a resident of Oswego and Elmhurst, Illinois, had and received a taxable income of approximately $21,856.00 upon which he owed approximately $3,943.00 to the United States of America in income tax; that the defendant was required by law, following the close of the calendar year 1981 and on or before April 15, 1982 to make an income tax return, and to pay such income tax to the Internal Revenue Service, that well knowing all of the foregoing facts on and before April 15, 1982, the defendant did wilfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America:

(1) By failing to timely make said income tax return to the Internal Revenue Service and to pay said income tax due and owing to the Internal Revenue Service;

(2) By supplying a false and fraudulent Employee's Withholding Allowance Certificate (Form W-4) to his employer on or about January 1, 1981; and

(3) By directing correspondence to his employer on or about September 28, 1981 in which he directed his employer to stop withholding taxes;

In violation of Title 26, United States Code, Section 7201.

COUNT FOUR

The SPECIAL OCTOBER 1984 GRAND JURY further charges that:

During the calendar year 1981 in the Northern District of Illinois, Eastern Division,

JAMES FOSTER,

defendant herein, who was a resident of Oswego and Elmhurst, Illinois, had and received a gross income of approx-

imately $29,755.00 that by reason of such income he was required by law, following the close of the calendar year 1981 and on or before April 15, 1982 to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago in the Northern District of Illinois, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to timely make said income tax return to the District Director of Internal Revenue, to the Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT V

The SPECIAL OCTOBER 1984 GRAND JURY further charges that:

During the calendar year 1982, in the Northern District of Illinois, Eastern Division,

JAMES FOSTER,

defendant herein, who was a resident of Elmhurst, Illinois, had and received a taxable income of at least $34,490.00 upon which he owed at least $8,617.00 to the United States of America in income tax; that the defendant was required by law, following the close of the calendar year 1982 and on or before April 15, 1983 to make an income tax return, and to pay such income tax to the Internal Revenue Service, that well knowing all of the foregoing facts on and before April 16, 1983, the defendant did wilfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America:

(1) By failing to timely make said income tax return to the Internal Revenue Service and by failing to pay said

income tax due and owing to the Internal Revenue Service;

(2) By directing correspondence to his employer on or about September 28, 1981 in which he directed his employer to stop withholding taxes;

(3) By supplying a false and fraudulent Employee's Withholding Allowance Certificate (Form W-4) to his employer on or about January 1, 1981; and

(4) By supplying a false and fraudulent Employee's Withholding Allowance Certificate (Form W-4) and accompanying documents to his employer on or about February 22, 1982;

In violation of Title 26, United States Code, Section 7201.

COUNT SIX

The SPECIAL OCTOBER 1984 GRAND JURY further charges that:

During the calendar year 1982 in the Northern District of Illinois, Eastern Division,

JAMES FOSTER,

defendant herein, who was a resident of Elmhurst, Illinois, had and received a gross income of approximately $37,062.00; that by reason of such income he was required by law, following the close of the calendar year 1982 and on or before April 15, 1982 to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago in the Northern District of Illinois, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to timely make said income tax return to the District Director of Internal Revenue, to the Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT SEVEN

The SPECIAL OCTOBER 1984 GRAND JURY further charges that:

On or about February 22, 1982, in the Northern District of Illinois, Eastern Division,

JAMES FOSTER,

defendant herein, who at that time was employed by Will-DuPage Service Company, Wheaton, Illinois and who was required under the Internal Revenue laws to furnish Will-DuPage Service Company with a signed Employee's Withholding Allowance Certificate (Form W-4) relating to the number of withholding allowances claimed by an employee, did wilfully supply a false and fraudulent Certificate to Will-DuPage Service Company on which he claimed exemption from withholding, whereas the defendant then and there well knew that he was not entitled to said exemption;

In violation of Title 26, United States Code, Section 7205.

A TRUE BILL:

/s/ Barbara A. Swanson
FOREPERSON

/s/ _____
UNITED STATES ATTORNEY

DMP/nw/wpc

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-105

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether petitioner's conviction for attempted tax evasion, which was based in part on his filing of false employee withholding allowance certificates, was foreclosed by the misdemeanor provision specifically addressed to the filing of false withholding information.

2. Whether the evidence was sufficient to support petitioner's conviction for tax evasion.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 789 F.2d 457.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1986. A petition for rehearing and suggestion for rehearing en banc was denied on May 23, 1986 (Pet. App. C1). The petition for a writ of certiorari was filed on July 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of willfully attempting to evade income taxes for the years 1981 and 1982, in violation of 26 U.S.C. 7201;[1] four counts of willfully failing to file an income tax return for the years 1979 through 1982, in violation of 26 U.S.C. 7203; and one count of willfully filing a false employee withholding allowance certificate (Form W-4) in 1982, in violation of 26 U.S.C. 7205 (Pet. App. A1, A2). Petitioner was sentenced to a total of 18 months' imprisonment. The court of appeals affirmed (Pet. App. A1-A12).

The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. A1-A2), established that petitioner sought to evade taxes by, inter alia, supplying false and fraudulent employee withholding allowance certificates to his employer, failing to file tax returns, and failing to pay taxes that were due and owing. Petitioner filed yearly income tax returns before 1979 and filed accurate W-4 forms with his employers before 1980. For the years 1979, 1980, 1981, and 1982, he filed no tax returns, although he had income in each of those years in excess of the amount requiring him to file a return. In January 1981, petitioner filed a W-4 form with his employer falsely claiming exemption from withholding. After the IRS instructed petitioner's employer to disregard his claim of exempt status and to continue withholding a portion of his wages, petitioner wrote two letters to his employer demanding that his claim of exempt status be honored (*id.* at

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) as amended.

A2). Following his filing of a second W-4 form in February 1982, in which he falsely claimed exemption from withholding, petitioner's employer stopped withholding taxes from his wages (*ibid.*).

ARGUMENT

1. Petitioner claims (Pet. 9-11) that his convictions for attempted tax evasion, which were based in part on his filing of false and fraudulent employee withholding allowance certificates, must be set aside because the filing of such a certificate may not be relied upon to establish a violation of the tax evasion statute, 26 U.S.C. 7201. The court of appeals correctly rejected that claim. Because the court's decision is not in conflict with the decision of any other circuit, and because it is based on a statutory provision that was repealed in 1984, further review by this Court is not warranted.

Section 7201 provides, in pertinent part (emphasis added):

> Any person who willfully attempts *in any manner* to evade or defeat any tax imposed by this title or the payment thereof shall, *in addition to other penalties provided by law*, be guilty of a felony * * *.

The language of Section 7201 is clearly broad enough to reach an attempt to evade tax by filing false employee withholding allowance certificates. In *Spies* v. *United States*, 317 U.S. 492, 499 (1943), this Court refused to "constrict the scope of the Congressional provision that * * * [an attempt to evade tax] may be accomplished 'in any manner.'" Instead, the Court held that an affirmative willful attempt may be inferred from "any conduct, the likely effect of which would be to mislead or conceal." *Ibid.* In the

absence of any express statutory restriction, the filing of a certificate with one's employer falsely claiming to be exempt from tax in order to stop the employer from withholding taxes would clearly constitute such conduct.

Petitioner argues, however, that such an explicit restriction appears in the language of the prior version of 26 U.S.C. 7205, which was applicable to petitioner's offenses. That version of Section 7205 made it a crime willfully to file a false and fraudulent employee withholding allowance certificate, and it further provided that the sanction for a violation of that section should be "in lieu of any other penalty provided by law."[2] As the court of appeals noted (Pet. App. A7-A8), the legislative history of Section 7205 does not support petitioner's attempt to restrict the broad reach of Section 7201.

The language "in lieu of any other penalty provided by law" was added to Section 7205 by Section 2(a) of the Current Tax Payment Act of 1943, ch. 120, 57 Stat. 138, codified at 26 U.S.C. 1626(d) (1939 Code). The legislative history of that statute explained that the penalties imposed by the prohibition against false withholding statements were intended to be "in lieu of those provided in section 145

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[2] For violations occurring after July 18, 1984, Congress has amended Section 7205 to provide that its penalties shall be "in addition to" any other penalty provided by law. Pub. L. No. 98-369, Section 159(a), 98 Stat. 696. The amendment was enacted in response to *United States* v. *Williams*, 644 F.2d 696, 700 (8th Cir.), cert. denied, 454 U.S. 841 (1981), where the court held that Congress intended the filing of a false W-4 form to be punished solely under Section 7205 and did not intend that such conduct could serve as the basis for a prosecution under 26 U.S.C. 7212 (endeavoring to obstruct the due administration of the Internal Revenue Code).

(a) of the code." S. Rep. 221, 78th Cong., 1st Sess. 31 (1943). Section 145(a) of the 1939 Internal Revenue Code was a misdemeanor penalizing the failure to file returns, submit information, or pay tax; it was the predecessor to Section 7203 of the 1954 Code. The legislative history did not indicate that Congress intended to erect a bar to prosecutions under Section 145(b), the 1939 predecessor to Section 7201. When Section 1626(d) was moved to Section 7205 in the 1954 Code, the legislative history noted that no change was intended from existing law. S. Rep. 1622, 83d Cong., 2d Sess. 602 (1954). Thus, as the court of appeals concluded (Pet. App. A7), "it appears that Congress intended a conviction for filing a false W-4 form to be in lieu of other misdemeanors involving filing but not in lieu of the felony offense of attempting to evade the income tax." Consequently, the language "in lieu of any other penalty provided by law" cannot be read as petitioner contends it should be. There is therefore no merit to petitioner's claim that his conviction for attempted tax evasion, which was based in part on his filing of false W-4 forms, was foreclosed by the limiting language of Section 7205.

Contrary to petitioner's claim, there is no conflict between the decision of the Seventh Circuit in this case and the decision of the Eighth Circuit in *United States* v. *Williams*, 644 F.2d 696, cert. denied, 454 U.S. 841 (1981). The court in *Williams* held that the filing of a false withholding statement did not constitute a violation of 26 U.S.C. 7212, the misdemeanor provision prohibiting obstruction of the due administration of the Internal Revenue Code. The *Williams* case did not involve Section 7201, the broad felony provision prohibiting attempts to evade

or defeat the payment of any tax. Moreover, the Section 7201 counts in this case were not based solely on petitioner's filing of false withholding statements; those filings were simply part of the evidence of petitioner's intention to evade the payment of taxes. Therefore, even if it was proper to construe the language of the prior version of Section 7205 to bar the use of a false withholding statement as the basis for a prosecution under a different tax misdemeanor provision, that would not require that the evidence of the false statement be excluded in a prosecution for tax evasion.

In any event, this issue is of no continuing importance. The 1984 amendment to Section 7205 eliminated the language on which petitioner relies and expressly provided that the penalties in that section are "in addition to" any other penalty provided by law. See note 2, *supra*. Any doubt that may have been created by the prior version of Section 7205 has thus been conclusively resolved by Congress for all post-1984 conduct. The alleged conflict between this case and the *Williams* decision therefore does not warrant review by this Court.

2. a. Petitioner contends (Pet. 11-17) that the evidence was insufficient to support his conviction of attempted tax evasion, because the filing of a false and fraudulent employee withholding allowance certificate does not constitute an affirmative act of evasion in violation of 26 U.S.C. 7201. The court of appeals properly rejected that argument (Pet. App. A9).

The courts that have addressed the issue have agreed that a willful failure to file a tax return and to pay the tax, coupled with the filing of a false withholding certificate, constitutes an attempt to evade or defeat taxes in violation of 26 U.S.C. 7201.

United States v. *Copeland*, 786 F.2d 768 (7th Cir. 1986); *United States* v. *House*, 617 F. Supp. 240, 243 (W.D. Mich. 1985), aff'd, 787 F.2d 593 (6th Cir. 1986) (Table). See also *Zell* v. *Commissioner*, 763 F.2d 1139, 1146 (10th Cir. 1985) (filing a false W-4 form is an "affirmative act" sufficient to justify the fraud penalty). The elements of willfully attempting to evade or defeat a tax are (1) the existence of a tax deficiency, (2) an affirmative act constituting an evasion or attempted evasion of the tax, and (3) willfulness. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). When a taxpayer has willfully failed to file a tax return in violation of Section 7203, his prior, concurrent, or subsequent making of a false statement relating to his tax liability satisfies the requirement of an affirmative act and elevates the Section 7203 misdemeanor to a Section 7201 felony. *United States* v. *Copeland*, 786 F.2d at 770; *United States* v. *Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981). See also *United States* v. *Stone*, 702 F.2d 1333, 1338 (11th Cir. 1983) (the affirmative act need be nothing more than the filing of a false and fraudulent tax return). Thus, petitioner's filing of false and fraudulent withholding allowance certificates was sufficient to permit his prosecution and conviction for tax evasion.

It does not matter that such a filing is itself a misdemeanor. *United States* v. *Copeland*, 786 F.2d at 770. See *Sansone* v. *United States*, 380 U.S. at 351. In *Spies* v. *United States*, 317 U.S. at 497, the Court described Section 7201 as "the capstone of a system of sanctions which *singly or in combination* were calculated to induce prompt and forthright fulfillment of every duty under the income tax law * * *" (emphasis added). As the Court explained (317 U.S. at 497, 499 (emphasis added)):

> A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony [a violation of Section 7201] may include one or several of the other offenses against the revenue laws. * * *
>
> * * * * * *
>
> Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax *in any manner or to defeat it by any means* lifts the offense to the degree of a felony.

Thus, the filing of a false withholding allowance certificate, though itself an offense under the Internal Revenue Code, may be alleged and proved as the means of attempting to evade tax.[3]

In any event, the false W-4 forms were not the only evidence offered to support the tax evasion charges. On both tax evasion counts, the government introduced evidence that, in addition to filing false W-4 forms, petitioner directed correspondence to his employer instructing it to honor his false W-4 forms and to stop withholding (Pet. App. A4, D3-D6). That correspondence was sufficient, by itself,

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[3] Equally without merit is petitioner's assertion (Pet. 14) that he was improperly convicted of violating Section 7201 because his filing of false W-4 forms did not mislead the Internal Revenue Service or his employer. Section 7201 punishes the attempt to evade the tax. It does not matter that the likelihood of success is small or that no one is misled: it is enough that petitioner acted with the requisite intent. Cf. *United States* v. *Lawson*, 670 F.2d 923, 928 (10th Cir. 1982) (Section 7205 prohibits the willful furnishing of false or fraudulent withholding information to an employer; the test is not whether the employer or the government was, or could have been, deceived).

to satisfy the requirement that the proof in a Section 7201 prosecution show an affirmative act of tax evasion. See *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *Spies* v. *United States*, 317 U.S. at 499. Thus, petitioner's conviction of tax evasion could have been sustained quite apart from his submission of false W-4 forms.

b. Finally, petitioner contends (Pet. 17-20) that the court of appeals erred in applying an objective standard to his conduct in determining the sufficiency of the government's proof of willfulness. Petitioner further contends that the Seventh Circuit's decision is contrary to decisions of other circuits that require proof of subjective intent to violate the tax laws. See, *e.g.*, *United States* v. *Aitken*, 755 F.2d 188 (1st Cir. 1985). The alleged conflict is not squarely presented in this case, since the district court found that petitioner subjectively intended to violate the law,[4] and since the court of appeals found the evidence to

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[4] The district court found that petitioner knew he was required by law to file income tax returns and that he willfully failed to do so. It also found that petitioner had filed false W-4 forms knowing them to be false, and that his overall purpose was to evade taxes (Tr. 156-157). At sentencing, the court underscored its finding of willfulness (Sent. Tr. 16-18):

> I found that he did not believe that those arguments [that wages are not income and that the tax laws did not apply to him] were valid. What he believed was that by advancing those arguments, he might be able to create a sufficient doubt of his willfulness that he would be able to defeat a prosecution for either a wilful failure to file tax returns or a wilful evasion of taxes or a wilful attempt to evade taxes. * * * And no reasonable or unreasonable person can have the least good faith belief at this late stage of the matter in the validity of such arguments. This defendant had no such belief.

be sufficient under either an objective or a subjective test.

As evidence of petitioner's subjective awareness of the law, the court of appeals pointed to his prior history of filing accurate returns and withholding certificates (see *United States* v. *Shields*, 642 F.2d 230, 231 (8th Cir.), cert. denied, 454 U.S. 848 (1981)), the notifications he received from the IRS concerning his tax liability (see *United States* v. *Green*, 757 F.2d 116, 123-124 (7th Cir. 1985); *United States* v. *Grumka*, 728 F.2d 794, 797 (6th Cir. 1984)), and the tax protester materials he sent to the IRS and to his employer (see *United States* v. *Reed*, 670 F.2d 622, 623 (5th Cir.), cert denied, 457 U.S. 1125 (1982)). Petitioner never asserted that he did not act voluntarily or intentionally. Rather, his sole claim throughout these proceedings has been that he did not know the requirements of the law—*i.e.*, that he was required to file tax returns, that he was not entitled to claim exemption from tax withholding, and that he owed a tax. The evidence introduced at trial and relied upon by the court of appeals was clearly sufficient to sustain the inference that petitioner was aware of the requirements of the law.[5]

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[5] In any event, it is not clear that the circuits are in conflict, as petitioner claims, because the law within the Seventh Circuit is still in a state of flux. In *United States* v. *Bressler*, 772 F.2d 287, 290 & n.1 (1985), cert. denied, No. 85-734 (Jan. 21, 1986) the Seventh Circuit noted that the defense of good faith misunderstanding of law "still appears to depend on objective reasonableness in this Circuit," but the court acknowledged apparently contrary authority within the circuit (see *United States* v. *Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984); *United States* v. *Walsh*, 627 F.2d 88, 92-93 (7th Cir. 1980)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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